APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 17, 1967)

No. 83-65

JOSEPH B. CRAWFORD, ET AL. v.
THE UNITED STATES

No. 93-65

ROCCO A. TRECOSTA v.
THE UNITED STATES

No. 267-65

GAIL M. AANENSON, ET AL. v.
THE UNITED STATES

No. 449-65

HARRY W. AHO, ET AL. v.
THE UNITED STATES

No. 159-66

HELEN PHYLLIS ABRAHAMSEN, ET AL. v.
THE UNITED STATES

No. 212-66

ESTHER KATRINA BARNES, ET AL. v.
THE UNITED STATES

No. 407-66

EDNA T. ACKAL, ET AL. v.
THE UNITED STATES*

Rocco A. Trecosta, pro se, in No. 93-65.

Earl C. Berger, attorney of record for plaintiffs in cases numbered 83-65, 267-65, 449-65, 159-66, 212-66, and 407-66. *Lorber, Vogel & Berger,* of counsel.

James F. Merow, with whom was *Assistant Attorney General Barefoot Sanders,* for defendant.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges.*

* By order of the court of December 12, 1966, No. 407-66, *Edna T. Ackal, et al.,* v. *The United States,* was consolidated with Nos. 83-65, 93-65, 267-65, 449-65, 159-66, and 212-66.

ON PLAINTIFFS' MOTIONS AND DEFENDANT'S CROSS MOTIONS FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

This is a suit brought by 2,975 plaintiffs for backpay, alleged to be due them as teachers in overseas dependents schools operated by the Department of Defense for the education of minor dependents of overseas personnel of such Department during the years 1959 through 1966, under the provisions of the Overseas Teachers' Pay and Personnel Practices Act, 5 U.S.C. §§ 2351-58 (1964), (hereinafter referred to as the Act or Public Law 86-91).

It is estimated by plaintiffs that this decision will affect some 20,000 overseas teachers whose claims amount to many millions of dollars.

For the purposes of this decision, the above-entitled seven cases have been consolidated inasmuch as the same basic issues are involved in all of them. The plaintiffs Joseph B. Crawford and Nell A. Walthers, No. 83-65, and Rocco A. Trecosta, No. 93-65, have moved for summary judgment and the defendant has filed a cross motion for summary judgment in all of the cases and they will be disposed of on the basis of such motions.

Prior to the years involved in these cases, the Congress did not enact any comprehensive laws with respect to the overseas school program for minor dependents of government personnel. The authority for operating such schools was contained in various appropriation bills for the Department of Defense and its various agencies. The bills authorized funds to be expended for these purposes when the Secretary of the Department concerned found that schools, if any, available in any given locality were unable to provide adequately for the education of such dependents.[1] Also, in each of these appropriation bills, as well as those enacted during the years involved here, Congress

[1] For example, see the Act of July 10, 1952, 66 Stat. 533, § 616 (1952).

placed an express limitation ceiling on the amount of the funds appropriated which could be used for the education of such dependents. This limitation was provided in the form of specific average amounts per pupil (hereinafter referred to as the "per pupil limitation"). For example, the following provision in the Act of October 17, 1963, was typical of similar statements in all of the relevant appropriation acts:

> Sec. 506. Appropriations for the Department of Defense for the current fiscal year shall be available * * * for primary and secondary schooling for minor dependents of military and civilian personnel of the Department of Defense residing on military or naval installations or stationed in foreign countries, * * * *in amounts not exceeding an average of $285 per student,* when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents * * *. [77 Stat. 264, § 506 (1963).][2] [Emphasis supplied.]

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[2] The various appropriations acts for 1953 to 1966, inclusive, showing the per pupil limitation for the overseas schools are as follows:

Fiscal year	*Appropriation Act citation*	*Per pupil limitation*
1953.....	66 Stat. 533 § 616 (1952)	$225
1954.....	67 Stat. 351 § 614 (1953)	225
1955.....	68 Stat. 351 § 709 (1954)	235
1956.....	69 Stat. 315 § 609 (1955)	240
1957.....	70 Stat. 468 § 607 (1956)	245
1958.....	71 Stat. 323-24 § 607 (1957)	245
1959.....	72 Stat. 724, 867 § 606 (1958)	245-265
1960.....	73 Stat. 378-79 § 606 (1959)	265
1961.....	74 Stat. 350 § 506 (1960)	275
1962.....	75 Stat. 375-76 § 606 (1961)	275
1963.....	76 Stat. 328 § 506 (1962)	280
1964.....	77 Stat. 264 § 506 (1963)	285
1965.....	78 Stat. 475 § 506 (1964)	285
1966.....	79 Stat. 873-74 § 606 (1965)	455

The Congress was informed at all times relevant to this case of the costs charged to appropriated funds and to the per pupil limitation in the overseas schools. Generally, such chargeable costs included salaries of superintendents and other professional and non-professional personnel engaged in the general administration of the schools, including secretarial and clerical assistants, office and miscellaneous school supplies, basic salaries and wages of principals, supervisors, consultants, *teachers,* and librarians. Also included in such costs were instructional material such as textbooks, replacement of library books, and instructional supplies.

There were other costs which were chargeable to appropriated funds but were not chargeable to the per pupil limitation which were generally as follows:

1. *Salaries and wages:*
   a. *Command Staffs and Other Support Personnel.*
   b. *Drivers.*
   c. *Custodial Services.*
2. *Utilities and Services.*
3. *Rental.*
4. *Travel, Overseas Allowances, Government Contributions.*
5. *Equipment (Replacement).*
6. *Supplies.*
7. *Transportation.*[8]

The per pupil limitation was arrived at each year by dividing the average daily membership of each of the schools into the sum of the total obligations and costs men-

[8] Department of Defense Instruction No. 1342.5, pp. 6-8, April 10, 1964.

tioned above which were chargeable to appropriated funds and to the per pupil limitation.

The Department of Defense has operated the overseas schools since World War II and up to and including the years involved in these cases under these appropriation acts of the Congress which expressly limited the expenditure of funds for the education of minor dependents of overseas personnel on a per pupil limitation basis as set forth in the appropriation acts.

The plaintiffs were recruited by the Department of Defense beginning in 1959, to teach in its overseas schools under the system then prevailing as indicated above. Prior to 1960, the plaintiffs were employed as teachers at the grade of GS-7 under the Classification Act of 1949, 5 U.S.C. §§ 1071-1174 (1964). Each of the plaintiffs was employed for a school year and his or her rate of pay was computed on the basis of the annual rate provided by the applicable schedule of the classification act, but only for the school year period for which they were employed. The computation procedure set up for this purpose is listed in Section 944 of the Federal Employees Pay Act of 1945, 5 U.S.C. §§ 901-58 (1964). There was a great deal of dissatisfaction among the teachers under this system because they were only paid for nine or ten-twelfths of the year since they did not work the entire year. This required them to be placed on a nonpay status during recess periods such as Thanksgiving, Christmas, Easter, and during the summer vacations. These problems, among others, caused the Congress to enact Public Law 86-91 which removed all teachers, including the plaintiffs, from the Classification Act of 1949, *supra*, the Federal Employees Pay Act of 1945, *supra*, and the Annual and Sick Leave Act of 1951, 5 U.S.C. §§ 2061-71 (1964), and provided a new system for the appointment of teachers, conditions of employment, rates of basic compensation, length of school years, quarters allowances, and various other entitlements. It

became law on July 17, 1959. The pertinent parts of Public Law 86-91 are as follows:

§ 2352. Regulations of Secretary of Defense

(a) Not later than the ninetieth day following July 17, 1959, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this chapter. Such regulations shall govern—

(1) the establishment of teaching positions;

(2) the fixing of the rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States;

(3) the entitlement of teachers to compensation;

(4) the payment of compensation to teachers;

(5) the appointment of teachers;

(6) the conditions of employment of teachers;

(7) the length of the school year or school years applicable to teaching positions;

(8) the leave system for teachers;

(9) quarters, allowances, and additional compensation for teachers; and

(10) such other matters as may be relevant and appropriate to the purposes of this chapter.

* * * * *

§2353. Administration

(a) Employment and salary practices.

The secretary of each military department in the Department of Defense shall conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this chapter, * * *

(b) * * * the secretary of each military department—

* * * * *

(2) shall establish the appropriate annual salary rate in accordance with this chapter for each such position and individual to which * * * determined to be applicable.

(c) Rates of basic compensation

The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.

As previously set out, Section 2352 of Public Law 86-91 required the Secretary of Defense to prescribe and issue regulations to carry out the purposes of the Act. In order to issue such regulations, a series of meetings was arranged between the Department of Defense and the Overseas Education Association and the National Education Association which resulted in the promulgation of what was known as "Salary Determination Procedures, Overseas Dependents School Teaching Positions Class I." These procedures provided for an annual review of the compensation schedules with a comparison to be made with rates of compensation in urban school jurisdictions of 100,000 population and over. This was because most of the teachers were recruited from urban areas with a population of 100,000 or more. The procedures thus established were keyed to the per pupil limitation established by Congress. For instance, it was provided that:

3. *Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustment in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.*

Comment: It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent in the operations of the dependents school. Since salaries comprise a

substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obtain an increase in the per pupil limitation is in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.

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5. *When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of a school year.*

Comment 1: It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation. [Emphasis in original.] [Salary Determination Procedures, Overseas Dependents School Teaching Positions Class I, Department of Defense, August 31, 1960.]

Pursuant to these salary determination procedures, compensation was adjusted upward for the year 1960, from $150 to $185 per step so as to approximate the average increment to be in effect in school jurisdictions in the United States with a population of at least 100,000.

Each year subsequent to 1960, the Department of Defense requested that the Congress increase the per pupil limitation so that salaries of teachers might likewise be increased. The Congress was thus apprised that the salaries of teachers were directly connected with the per pupil limitation. It appears that the Congress, in fixing

the per pupil limitation for each of the years involved, considered not only the salaries paid to the teachers, but also fringe benefits available to them overseas that were not enjoyed by teachers holding similar positions in the United States.

In 1961, a $10 increase was requested by the Department of Defense of Congress so that a $200 increase in salary might be made for teachers, but the request was denied. For the school year 1962-63, $10 was requested so that salaries might be raised $190, but only $5 was granted and the contemplated raise was not given. For the school year 1963-64, $5 was requested and granted and accordingly the $100 raise was given to teachers as planned. However, for the school year 1964-65, a $10 increase was requested so that teachers salaries might be raised $200, but it was denied and the raise was not possible. For school year 1965-66, the entire per pupil limitation system was changed to include all costs of the overseas schools including $11 to allow an increase of $300 in the salaries of the teachers. The request of $445 per pupil was granted and the $300 raise was given to the teachers. In 1966, Public Law 86-91 was amended so as to provide that salaries for overseas teachers would *be equal* to the salaries of teachers in comparable positions in school districts in the United States having a population of 100,000 or more.[4] This law became

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[4] Public Law 89-391, effective April 14, 1966, provided as follows:

"5 U.S.C. 2352(a)(2) is amended to read as follows:

"(2) the fixing of basic compensation for teachers and teaching positions at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more populaton;".

" • • • 5 U.S.C. 2353(c) is amended to read as follows:

"(c) The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population."

effective on the first day of the first pay period after the enactment of the Act and accordingly was placed into effect by the Department of Defense promptly after April 14, 1966. Consequently, there has been no problem with respect to overseas teachers' salaries since the passage of the amendment in 1966.

The plaintiffs allege that they were not paid salaries as overseas teachers in accordance with the provisions of this Act. They have filed these suits to be recompensed for the difference between what was actually paid to them and the amount which they claim is owed to them pursuant to Public Law 86-91. It is undisputed that all of the plaintiffs were paid the salaries which they were promised at the time they were recruited.

More particularly, the plaintiffs contend that Public Law 86-91 required the secretary of each military department to fix the salaries of teachers in his department so that they would be *equal* to the salaries paid to teachers in similar positions in schools located in the District of Columbia.[5]

They offer the alternative argument that the Congress fixed their salaries by Public Law 86-91 at rates *equal* to those paid teachers in similar positions in schools located in the United States, but not to exceed the highest salaries for comparable positions in the District of Columbia.

In either event, their position is quite clear—that since the standard set out is one of equality, their salaries must be continuously readjusted to reflect fluctuations in salaries paid to teachers occupying similar positions in the United States.

They claim that the Secretary of Defense had no discretion except to pay the salaries as fixed by the Congress in the Act, and that continuing readjustment was mandatory

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[5] Plaintiff, in No. 93-65, contends that he should have been paid a salary equal to the salaries paid to teachers occupying similar positions in Puerto Rico and Panama.

without regard to the per pupil limitation contained in the appropriation acts of the Congress during the years that are relevant here.

The defendant responds with two contentions either of which, it asserts, bars recovery. First, that the Act in no way requires continuing readjustments in salary rates absent prior congressional approval and in fact there were no funds to pay the salaries now claimed. Second, assuming *arguendo,* that the Congress had established a specific mandatory statutory rate, the fixing of annual expenditure ceilings via the per pupil limitation resulted in an implied repeal of any obligation Public Law 86-91 is said to have created.

Plaintiffs naturally take the position that there was no implied repeal and allege that during each of the years involved in this case there was a balance of unobligated funds remaining on hand for the Department of Defense in a sufficient amount to have paid the plaintiffs the salaries which they claim they were entitled to under Public Law 86-91. Further, assuming for the sake of argument that there was a failure or exhaustion of appropriation, plaintiffs argue that this would not affect their right to secure the additional earnings.

Finally, the plaintiffs in No. 83-65, press a separate claim for the first time in their motion for summary judgment. They urge that they are entitled to additional compensation for their services prior to the effective date of Public Law 86-91 when the Classification Act of 1949, *supra,* was applicable to them. The claim embraces compensation for the various periods during which they were placed on a leave without pay status.

Once unravelled, the present conflict almost wholly involves the proper interpretation to be placed upon Public Law 86-91.

In the first place, the plaintiffs have consfrued the words "in relation to" in Section 2353(c) of the Act to mean "equal to" salaries of teachers occupying comparable positions in schools located *in the District of Columbia.* In order to resolve this matter of interpretation of the Act, we must look to the statute itself.

While we recognize that courts can go beyond the language contained in a statute to ascertain its meaning, they should be careful in departing from the statutory terms. To the extent possible, violence should not ordinarily be done to the words chosen by the Congress. *Flora* v. *United States,* 357 U.S. 63, 65 (1958), *aff'd on rehearing,* 362 U.S. 145 (1960); *Thermo King Corp.* v. *United States,* 173 Ct. Cl. 860, 868, 354 F. 2d 242, 246 (1965).

To accept the plaintiffs' contention that the salaries were to be equal to those in the District of Columbia, would accord little, if any, significance to the prohibition against fixing salaries in excess of those paid to District of Columbia teachers. Moreover, the standard, plainly set out in the statute, of comparing the overseas rates of basic compensation with those prevailing in the United States for comparable positions would be rendered meaningless.

It is a cardinal principle of statutory construction to give effect to every clause, sentence and word of a statute, if possible, rather than to distort the language so as to defeat the plain intent of the Congress. *United States* v. *Menasche,* 348 U.S. 528, 538-39 (1955); *United States* v. *Alpers,* 338 U.S. 680, 681-82 (1950); *Johnston* v. *United States,* 163 Ct. Cl. 375, 380 (1963); *Drier* v. *United States,* 108 Ct. Cl. 487, 494, 70 F. Supp. 888, 892 (1947). When this is done with respect to Public Law 86-91, it is clear that it nowhere fixes the salaries of overseas teachers equal to the salaries of teachers occupying comparable positions in the District of Columbia. To place such a construction

upon the Act, we would be required to read into it words which are not there. We therefore reject the plaintiffs' first contention.

Secondly, we must examine whether the Act required rates of basic compensation to be equal to those paid teachers in similar positions in schools located *throughout the United States.*

Aside from the fact that such an interpretation of the Act would prove unworkable under the plaintiffs' theory that the secretary was not clothed with discretion to fix salaries, plaintiffs face and cannot overcome the same obstacles which caused us to discard their first argument—that is—their view reads words into the Act and leaves words and sentences contained therein without purpose.[6]

It is also clear that the Congress merely set the boundaries of the program allowing the Secretary of Defense to fill in the details. Nowhere did Congress fix salaries in Public Law 86-91, nor did it define the positions which were to be looked to in the United States as similar to those occupied by the overseas teachers.

That the Secretary was vested with discretion to issue regulations governing the fixing of rates of basic compensation follows unmistakably from the grant of authority contained in Section 2352(a)(2) of the Act.

Also relevant in this vein is the fact that there was no line item for teachers' salaries or for any other specific expense of the overseas schools in any of the appropriation

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[6] The legislative history referred to by the plaintiffs in their brief does not support their positions. The strongest language contained in the hearings and committee reports do no more than reflect the language contained in the Act itself. See *Hearings on H.R. 1871 and related bills Before the Subcommittee of the House Committee on Post Office and Civil Service,* 86th Cong., 1st Sess. 5-7, 24 (1959); H.R. Rep. No. 357, 86th Cong., 1st Sess. 4-5 (1959).

acts of the Congress. The funds for such schools were appropriated in a lump sum subject to the per pupil limitation and the Department of Defense was authorized to disburse the funds for the various costs and expenses of the schools within the per pupil limitation contained in each appropriation act. Plaintiffs' recognition that no portion of the appropriated funds were earmarked points up all the more the administrative discretion in discerning relative needs and priorities.

While the issue of executive discretion has been determined by the foregoing analysis, it is pertinent to note that some of the plaintiffs in No. 267-65, were denied a writ of mandamus to compel the Secretary of Defense to grant pay raises under Public Law 86-91. *Mitchell* v. *McNamara*, 352 F. 2d 700 (D.C. Cir. 1965). It was said that:

> * * * courts will not interfere with the exercise of executive discretion in situations as confused and difficult as the present. [*Supra* at 701.]

This is persuasive authority for the position we take today. See *United States* v. *Shimer*, 367 U.S. 374, 381-82 (1961); *Fix* v. *United States*, Ct. Cl. No. 323-60, decided November 10, 1966, slip op. pp. 6-7, 368 F. 2d 609, 614.

Having decided that a standard of equality was not prescribed by the Congress and, furthermore, that the Secretary of Defense was clothed with discretionary powers, we turn our attention to the regulations promulgated by him under the Act and an ascertainment of whether plaintiffs' salaries were to be continuously adjusted in accordance with increments given to teachers serving in similar positions in the United States as defined in the regulations, independent of the appropriation authorized.

Although resolution of this issue is not assisted by the most careful reading of the statute, a thorough search of the legislative history of Public Law 86-91 and its

attendant circumstances leads to the conclusion that the plaintiffs' position cannot be sustained.

During the hearings on Public Law 86-91, it was estimated that the proposed legislation would cost only an additional $270,000 per year and that this was due to the fact that an increment was planned for teachers with higher qualifications. This view was concurred in by the teachers' representative, Miss Mary Hoague, who also rejected the thought that the legislation was to be a pay raise measure. *Hearings on H.R. 1871 and related bills Before the Subcommittee of the House Committee on Post Office and Civil Service,* 86th Cong., 1st Sess. 17, 37, 41-2 (1959).

These considerations were accepted by the Congress as illustrated by the following excerpt from H.R. REP. No. 357, 86th Cong., 1st Sess. 3 (1959):

* * * * *

COST

> The Department of Defense estimates that enactment of this legislation will result in increased costs in the approximate amount of $270,000 per annum for operation of the dependents schools in oversea areas. The major part of this additional cost will be incurred by reason of additional compensation allowed certain teachers in recognition of advanced degrees and teaching experience.

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Had Congress sought to disclose an intent to create a mandate for continuing automatic pay adjustments divorced from legislative control, it certainly would not have limited its consideration to increments concerned solely with higher qualifications.

In addition, it will be recalled that the Secretary of Defense issued regulations after consultation with repre-

sentatives of the Overseas Education Association and the National Education Association calling for an annual salary review with a comparison to be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Furthermore, as previously indicated, these procedures were explicitly made subject to the per pupil limitation and transmitted to the interested parties.[7]

That the various education associations were advised of the effect of the per pupil limitation contained in the various appropriation acts is amply demonstrated by the following statements they made before the Senate:

> Last August our Overseas Education Association, the National Education Association and the Department of Defense agreed upon the "Department of Defense Salary Determination Procedures," which provides for an annual review and adjustment of overseas teachers' salaries in conformity to the average of stateside districts having 100,000 or more in population. We value this decision highly, and at the same time recognize that the adjustment of our salaries is dependent upon the per pupil money allotment voted by the Congress. [*Hearings on H.R. 7851 Before the Subcommittee of the Senate Committee on Appropriations,* 87th Con., 1st Sess. 1054 (1962).]

Also, it was stated in even a later year:

> This unhealthy salary situation, recognized by DOD's own report, is the direct result of a per-pupil limitation. The limitation limits salaries. It limits the amount of money which may be spent for textbooks,

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[7] Other regulations promulgated by the Secretary of Defense also made reference to the per pupil limitation. See Department of Defense Instruction No. 1342.5, October 28, 1957; Department of Defense Instruction No. 1342.5, April 10, 1964. (The latter instruction cancelled the instruction dated October 28, 1957.)

library books, and tuitions, but since most of the money appropriated goes into salaries, it is salaries which are in turn most limited. [*Hearings on H.R. 7179 Before the Subcommittee of the Senate Committee on Appropriations*, 88th Cong., 1st Sess. 1456 (1964).]

At this juncture we have the situation where there was not even the slightest suggestion or intimation by the Congress that Public Law 86-91 required constant adjustment of teachers' salaries, where the Secretary of Defense implemented the statute under specific monetary ceilings, and where the persons affected were mindful of this interpretation and, at least, to some extent acquiesced in it.

These circumstances call for application of the rule that administrative practice consistent and generally unchallenged "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norweigian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Accord, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), *rehearing denied*, 380 U.S. 989 (1965), *Power Reactor Development Co.* v. *International Union of Electrical Radio & Machine Workers*, 367 U.S. 396, 408 (1961). See *Iran Nat'l Airlines Corp.* v. *United States*, 175 Ct. Cl. 504, —, 360 F. 2d 640, 643 (1966); *H. B. Zachry Co.* v. *United States*, 170 Ct. Cl. 115, 125, 344 F. 2d 352, 358-59 (1965); *Schellfeffer* v. *United States*, 170 Ct. Cl. 178, 187, 343 F. 2d 936, 942 (1965). We accept this administrative interpretation as correct.

Fortifying this result even further is the fact that at hearings on appropriations for the overseas school program for the years in question, the Congress was continually made aware of the interpretation placed upon the

Act by the Secretary of Defense.[8] This supports "the natural presumption that Congress, in its subsequent actions, accepted them as legitimate interpretations." *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 544-45 (1954); *Power Reactor Development Co., supra*, at 408-09. See *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 319 (1958).

This legislative history of Public Law 86-91 supports and adds emphasis to the conclusions we have already reached that the Act did not fix the salaries of overseas teachers equal to those in comparable positions in the District of Columbia or throughout the United States.

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[8] The plaintiff seeks to make much of the fact that the Department of Defense never sought supplemental appropriations to meet the salary demands of the plaintiffs. It is a fact, however, that the Department of Defense requested an increase in the per pupil limitation for every fiscal year bearing upon the subject matter in these suits so that teachers' salaries could be raised. See *Hearings on H.R. 11998 Before the Subcommittee of the Senate Committee on Appropriations*, 86th Cong., 2d Sess., pt. 2, 1415 (1961); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 87th Cong., 1st Sess., pt. 6, 138-39 (1962); *Hearings on H.R. 7851 Before the Subcommittee of the Senate Committee on Appropriations*, 87th Cong., 1st Sess. 1143 (1962); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 87th Cong., 2d Sess., pt. 3, pp. 718-22, pt. 6, p. 77 (1963); *Hearings on H.R. 11289 Before the Subcommittee of the Senate Committee on Appropriations*, 87th Cong., 2d Sess. 719-20 (1963); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 88th Cong., 1st Sess., pt. 4, 49, 982, 998-99 (1964); *Hearings on H.R. 7179 Before the Subcommittee of the Senate Committee on Appropriations*, 88th Cong., 1st Sess. 213 (1964); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 88th Cong., 2d Sess., pt. 2, 633-50 (1965); *Hearings on H.R. 10939 Before the Subcommittee of the Senate Committee on Appropriations*, 88th Cong., 2d Sess., pt. 2, 532-34, 764-66 (1965); *Hearings Before the Subcommittee of the House Committee on Appropriations*, 89th Cong., 1st Sess., pt. 5, 580-602, 681-722 (1966); *Hearings on H.R. 9221 Before the Subcommittee of the Senate Committee on Appropriations*, 89th Cong., 1st Sess., pt. 2, 554-55 (1966).

Furthermore, it shows unmistakably that such salaries were keyed to the per pupil limitation contained in the appropriation acts of the Congress and were to be fixed within such limitation in the discretion of the Secretary of Defense.

The plaintiffs fashion the argument, however, that since the 1966 amendment to Public Law 86-91 provides that salaries for overseas teachers would be equal to the salaries of teachers in comparable positions in school districts in the United States having a population of 100,000 or more, this is a positive expression of the intent that Congress had in enacting the original legislation in 1959.

While undoubtedly both the plaintiffs and defendant could select choice bits of legislative history to support their views as to the effect of the 1966 amendment, we are of the opinion that it is hazardous business to resort to that legislative history in ascertaining the intent underlying the passage of Public Law 86-91. *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 348-49 (1963) and cases collected therein.

Moreover, it is arguable that Congress, as shown by its continued acquiescence, accepted the interpretation of the Department of Defense and recognized the need for the 1966 amendment if a different result was desired.

Plaintiffs, however, place great emphasis on the assertion that the Department of Defense had unobligated funds from which these salary claims could have been paid.

Since we have recognized that increments to teachers' salaries were limited by the congressional appropriations as set forth each year in the per pupil limitation, suffice it to say that the Department of Defense would have no authority to expend funds except for the purposes for which an appropriation was made. See *Norcross* v. *United States,* 142 Ct. Cl. 763 (1958); *Norcross* v. *United States,*

142 Ct. Cl. 767 (1958); *Lovett* v. *United States,* 104 Ct. Cl. 557, 66 F. Supp. 142 (1945), *aff'd on other grounds,* 328 U.S. 303 (1946); *Maiatico* v. *United States,* 302 F. 2d 880 (D.C. Cir. 1962); 21 Ops. Att'y Gen. 414, 415 (1896); 34 Ops. Comp. Gen. 599, 600 (1955).

Since it is uncontroverted that there were no funds remaining within the confines of the per pupil limitation with which the salaries claimed could have been satisfied and that no abuse of discretion has been shown in the disbursement of those funds by the agency, we conclude that the plaintiffs have shown no basis for recovery under Public Law 86-91. See *United States* v. *Shimer, supra.*

In view of our disposition of the case thus far, it is unnecessary to consider the other issues raised by the parties concerning Public Law 86-91.

The determination of one further issue, however, is necessary to a complete disposition of this case. That is the claim based upon the Classification Act of 1949, *supra.*

Inasmuch as this claim was not pleaded in the petition in No. 83-65, filed on March 18, 1965, nor was an amendment sought as provided in our Rule 22, it is not properly before the court at this time and cannot be considered.

Accordingly, defendant's cross motion for summary judgment is granted, plaintiffs' motions for summary judgment are denied, and plaintiffs' petitions are dismissed.

Nichols, *Judge,* dissenting:

With all respect, I am unable to agree with the decision of the majority in this case.

I start with the language of the controlling statute, 5 U.S.C. 2353(c), which at pertinent times (July 1959

to the institution of this action in March 1965) read as follows:

> *Rates of Basic Compensation.*
>
> The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia.

Before going into the complications arising from events subsequent to enactment, it is well to consider what this means, taken on its face alone. Plaintiff says "in relation to" means "equal to" which of course would make interpretation easy. Webster's Unabridged Dictionary (1953 ed.) says that in the phrase "in relation to" the word "relation" means "reference" or "respect." I think a fair interpretation is that the Secretary is to "refer" to stateside salaries in the sense that a mariner might "refer" to a chart. The chart does not tell the mariner where to go but it tells him how to find his destination and the location of shoals he is to avoid. He would be guilty of misconduct if he ignored what the chart told him. I think the Secretary was to ascertain stateside salaries and, in light of his findings, was to fix compensation that was at least comparable. Otherwise why refer to them? He was clearly not to ignore stateside salaries and fix basic compensation out of all "relation" to them, which I find to be what he did, as is admitted in defendant's statement, paragraph 16(a). This appears to be a typical case of a proper delegation of legislative authority, with guidelines. *J. W. Hampton & Co.* v.

United States, 276 U.S. 394 (1928) (authority to raise customs duties to "equalize" cost of production). Delegation of uncontrolled discretion, or discretion without guidelines would be of doubtful constitutionality and we are not to presume the Congress intended it. *Cochnower v. United States*, 248 U.S. 405 (1919).

The defendant knows what "in relation to" means, whether or not the court does. It says (original brief, p. 28):

> Thus, from the date that the salary provisions of Public Law 86-91 were implemented, in January of 1960, throughout the school year ending in June of 1961, teachers were compensated pursuant to a pay schedule fixed by the Department of Defense *in relation to* school districts in the United States having a population of 100,000 or more. • • • (Emphasis supplied.)

It makes no such claim for any later year in this litigation. Evidently, to it, the statutory language set a clear and specific guideline which it conformed to up to June 1961, and not afterwards. At page 31 of the original brief it says:

> Thus, for the school year 1961-1962 the rates paid were admittedly lower than those which would have been paid had the rates been adjusted to conform to the average of districts • • •.

And so it went.

Assume then, the Secretary had not the apparently impossible task of determining an exactly "equal" compensation, but of finding one that was "in relation," he could have exercised his authority validly to select any figure within a range. If budgetary considerations had led him to prefer the lower side of the range, his choice would not have been subject to challenge in court. But here he made

a two step determination. In every year after 1961, he selected a figure that he found was "in relation," and then afterwards he cut it substantially to meet his budget exigencies. This procedure seems to me in a manner to say to the teachers involved, to the Congress, and to this court, that the final figures were not "in relation" and were out of "relation" to the statutory guidelines, by amounts furnished to the Congressional Committees.

It is conceded, as it must be, that he could not cut a statutory salary to avoid incurring a budget deficiency, or at least, if he did, the difference would be recoverable in this court. *United States* v. *Langston,* 118 U.S. 389 (1886). See the long line of cases cited, *Lovett* v. *United States,* 104 Ct. Cl. 557, 582, 66 F. Supp. 142 (1945), *aff'd on other grounds,* 328 U.S. 303 (1946).

Defendant repeatedly states the proponents of the bill denied it would raise wages. This was apparently true under any interpretation for the immediate future, and for the years that were then more remote, of course no one could have said what would occur. Defendant also says the law did not create a "mandate for continuing automatic pay adjustments." It apparently does not mean, as one might at first think, that the statute froze wages at their then rates. The Secretary did in fact adjust them annually. What the court might do if he had made no determinations but had elected to leave existing scales in effect is not before us and we need not consider what, in that event, plaintiffs' remedies would have been.

If, for fear of a budget deficiency, the salary is set below the range the guidelines permit, the situation is the same as if a fixed salary were cut. If the Secretary had not made his determination, within the guidelines, and then cut it, there might be some question as to the measure of damages, but here he has solved that problem for us, at least sufficiently for the purposes of a dissenting opinion.

Now, I turn to the subsequent events that are supposed to make a difference. It appears that when 5 U.S.C. 2353 (c) became law, as for some time before, the Congress had been accustomed to prescribe in the annual Department of Defense appropriation a per pupil limitation (hereinafter, as in the briefs, PPL) which limited the availability of funds for overseas dependent's schools, including teacher's salaries and certain overhead items in Government schools, and charges in tuition-fee schools not operated by the Department of Defense, to a stated amount per pupil. Soon upon the enactment of 5 U.S.C. 2353(c) the Department took the position that if the PPL came into any conflict with the new standard, it would prevail, that is, statutory salaries would have to be cut to meet the PPL. In presenting its annual appropriation requests, the Department made it clear to the Appropriations Committees that the PPL would have to be lifted if the statutory standard were to be met, and by implication, that it was being treated as controlling *pro tanto* the statutory provision. Nevertheless, the PPL was not raised, or not enough. The Department came to fix the salaries tentatively only, and then to cut them when the appropriation bill was law and the PPL therefore known.

Are the PPL provisions to be treated as amending annually the provisions of 5 U.S.C. 2353(c)? The answer seems clearly no. Normally, limitations in appropriations do not "reach to this court." *Lovett* v. *United States, supra.* On their faces, moreover, they could stand together and both be given effect. The teachers apparently could have been allowed their statutory pay and the PPL also observed, by increasing the size of classes, cutting overhead, or otherwise. The only time the Appropriations Committees mentioned the apparent conflict, it said in substance that the PPL could be observed and teachers be given their justified increases if certain economies were effected. House Report 1607, 87th Cong., 2d Sess. It may well be that as a practical matter, the full salaries could not be paid within the PPL's, but this depended on

information the Congress may not have accepted as true. A statute is not readily to be taken as repealing by implication another which it does not designate expressly for repeal. *United States* v. *Langston, supra.* Defendant also refers to the Anti-Deficiency Act, 31 U.S.C. 665, but this would not be binding on this court, whose judgments are separately funded.

If the Congress adverted to the possibility that the PPL's were construed as denying the teachers their legal rights, it may have intended that they be tested in this court.

Nor are these subsequent proceedings to be treated as subsequent legislative history bearing on the interpretation of 5 U.S.C. 2353(c). We would have to find the statute ambiguous, which in my view it hardly is. A declaration by the Congress itself what a former Congress meant would not be more than persuasive, depending on circumstances. *Rainwater* v. *United States,* 356 U.S. 590, 593 (1958). That declaration not only did the Congress not give, but the Appropriations Committees did not. It was very careful to leave the statutory construction here involved to stand on the authority of the Department of Defense alone. Indeed, to have complained that the Department of Defense was being too careful with appropriated funds would, for an appropriations committee, have been a case of man biting dog. The Congress must know of a statutory construction before it can ratify it. We are not always obliged to suppose a Congress knows what a committee has been told, especially when, as here, the committee is not the one that reported the statute to be interpreted. When the Committees on Civil Service of the House and Senate learned of the interpretation here involved, they repudiated it emphatically. In Rep. No. 951, 89th Cong., 2d Sess., the Senate Committee said the law had "never been administered in the manner which Congress intended."

The strongest argument for the defendant derives, in my view, from the interpretation which the Department of Defense adopted upon enactment of the statute to be construed. Undoubtedly, in view of their sponsorship of the legislation and the work with the committees they must have done, there could have been unrecorded or unpublished legislative history leading their officials to construe the legislation as they did. To me, however, such contemporaneous official interpretation is a better guide when it is uncoerced. The predicament an official of the executive branch is placed in, when in a squeeze between law and appropriation limitations, is something we should regard with realism, if with sympathy too. To keep his program going, which he may well regard as his primary duty, he may adopt an interpretation of law which under other circumstances he would consider untenable. Of course, the issue was academic as long as the PPL did not force the teachers' pay out of "relation." When it did, the Department might well have feared that to insist on the statutory pay levels would throw the overseas dependent's schools into chaos. To insist on the teachers' statutory rights might have denied another right, and denied it beyond all reparation by the courts; the right of those who serve their country overseas to have their children educated as they would be at home. The facts, of course, do not establish that the interpretation here involved was made under duress, but there seems to me a substantial possibility that it was. Actual inquiry as to this would be difficult and perhaps unwholesome, but I would apply with hesitation the whole concept of a contemporaneous administrative interpretation when the interpretation at issue appears to have been necessary for budgetary reasons or might have been supposed to be so necessary.

In *Schellfeffer* v. *United States*, 170 Ct. Cl. 178, 343 F. 2d 936 (1965), this court took the view that it would hesitate to overturn a consistent administrative interpre-

tation of a statute, particularly when to do so would impose on the United States a large financial burden. Sound in its then context, such a course is misapplied when the administrative interpretation involved is shown to have been itself based on budgetary considerations. It would then be tantamount to saying a debtor is exonerated from paying by his consistent and long-established opposition to paying. If the Government should benefit from such a doctrine, it would hardly have put itself in the position of a private litigant, who would probably be jailed for contempt if he interposed such a defense. The Government here was on notice that its interpretation of the statute was challenged, as it does not deny, and it continued to adhere to its position, without doing anything to clear the matter up. To my way of thinking, a long-continued administrative practice is on a different footing when it has ignored an equally long-continued challenge to its legality, and in that event it awaits the event of judicial determination without influencing it in any way.

Defendant's whole handling of this case has an odd flavor I find it hard to give a name to. They are stuck with their position. They must do their best to defend it, as they do. Yet, if plaintiffs should prevail, I cannot picture the Pentagon being draped in black. The exigencies of Government as it is practiced force the bureaucrat into successions of extravagance and meanness, and he must do many a thing his heart is not in. If an institution less august than the Department of Defense were involved, I would call its role in this litigation ignominious.

This dissent does not apply to any claim by plaintiffs for salary earned before June 30, 1961, or for any salary earned thereafter in excess of the difference between the amounts paid and the amounts determined by the Department of Defense "in relation to" certain stateside salaries, as acknowledged in its briefs and other filings.

DURFEE, *Judge*, joins in the foregoing dissenting opinion.

APPENDIX B

Statutes and Regulations Involved

The Defense Department Overseas Teachers Pay and Personnel Practices Act, Public Law No. 86-91, 73 Stat. 213 (1959), provided in pertinent part as follows:

"Sec. 4. (a) Not later than the ninetieth day following the date of enactment of this Act, the Secretary of Defense shall prescribe and issue regulations to carry out the purposes of this Act. Such regulations shall govern

• • •

"(2) the fixing of rates of basic compensation for teaching positions in relation to the rates of basic compensation for similar positions in the United States;

• • •

"Sec. 5. (a) The secretary of each military department in the Department of Defense shall conduct the employment and salary practices applicable to teachers and teaching positions in his military department in accordance with this Act, other applicable law, and the regulations prescribed and issued by the Secretary of Defense under section 4 of this Act.

• • • •

"(c) The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia."

• • •

The Department of Defense Appropriation Acts for the fiscal years 1953 through 1966 each contained a section authorizing the expenditure of funds for the operation of schools for the education of dependents of military and civilian Government personnel stationed overseas. The applicable Appropriations Act for the fiscal year 1953, § 616, 66 Stat. 533, provides in pertinent part as follows:

> "Appropriations for the Air Force and the Army for the current fiscal year shall be available for expenses in connection with * * * primary and secondary schooling for dependents of military and civilian personnel of the Department of Defense residing on military installations or stationed in foreign countries in amounts not exceeding an average of $225 per student, when the Secretary of the Department concerned finds that schools, if any, available in the locality, are unable to provide adequately for the education of such dependents."

The equivalent provisions in the subsequent Appropriation Acts are substantially identical, except for the amount of the average expenditure per student, which varied as follows:

Fiscal year	*Appropriation Act citation*	*Per pupil limitation*
1953.....	66 Stat. 533, § 616 (1952)	$225
1954.....	67 Stat. 351, § 614 (1953)	225
1955.....	68 Stat. 351, § 709 (1954)	235
1956.....	69 Stat. 315, § 609 (1955)	240
1957.....	70 Stat. 468, § 607 (1956)	245
1958.....	71 Stat. 323-324, § 607 (1957) ..	245
1959.....	72 Stat. 724, 867, § 606 (1958) ..	245-265
1960.....	73 Stat. 378-379, § 606 (1959) ..	265
1961.....	74 Stat. 350, § 506 (1960)	275
1962.....	75 Stat. 375-376, § 606 (1961) ..	275
1963.....	76 Stat. 328, § 506 (1962)	280
1964.....	77 Stat. 264, § 506 (1963)	285
1965.....	78 Stat. 475, § 506 (1964)	285
1966.....	79 Stat. 873-874, § 606 (1965) ..	455

The Department of Defense Directive No. 1400.13, issued on October 15, 1959, provided in pertinent part as follows:

"F. *Compensation of Teaching Positions*

"1. *Basis*

"Rates of basic compensation for teaching positions will be fixed by the Secretaries of the military departments in relation to rates of basic compensation for similar positions in the continental United States, exclusive of Alaska and Hawaii, but no such rate shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the Municipal government of the District of Columbia.

"2. *Schedules*

"A single, coordinated, uniform compensation schedule will be jointly developed and adopted, and from time to time adjusted, as appropriate, by the three military departments, which will:

"(a) List the various classes and levels of teaching positions;

"(b) For each level, establish and prescribe on a school year basis the basic compensation step rates. At each level the schedule will also provide, in each step rate, for an appropriate additional increment for those teachers who possess a Master's degree and may provide a further increment for those who have completed a higher level of academic preparation."

There were various amendments to this Directive subsequent to October 15, 1959 but the pertinent provisions quoted above remained unchanged.

On August 31, 1960, the Department of Defense promulgated "SALARY DETERMINATION PROCEDURES—OVERSEAS

DEPENDENTS SCHOOL TEACHING POSITIONS CLASS 1" which provides as follows:

"SALARY DETERMINATION PROCEDURES

"OVERSEAS DEPENDENTS SCHOOL TEACHING POSITIONS CLASS 1*

"1. *The compensation schedule will be reviewed annually.*

"COMMENT: It is recognized that many individual school districts review schedules each year and that a majority of the schedules are likely to be changed in any given year. It is recognized that to date the Classification Act and some other white collar pay plans have not been reviewed annually. It is customary, however, in government when wage schedules are administratively determined and related to prevailing rates, to provide an annual review. This procedure statement does not mean that the compensation schedule would be adjusted annually to reflect every increase, no matter how small, in the level of rates for teaching positions and this point is discussed later in this paper.

"2. *Review of the compensation schedule will be based on surveys of teaching position salaries conducted by the military departments, including the use of such athoritative salary data as may be available.*

"COMMENT: The military departments will conduct surveys of teacher salaries, extra curricular pay benefits and certain school administrative type positions as are necessary but will make maximum use of available authoritative data. The National Education Association collects and publishes data on salaries paid classroom teachers and school administrators in the United States. These publications are factual and

(* These procedures relate to teaching positions as defined in DOD Instruction 1400.13).

can be used along with other appropriate data in determining overseas dependents school teachers' salaries.

"3. *Salary data for teaching positions will be obtained and analyzed on a timely basis and the results will be utilized to seek adjustments in the per pupil limitation sufficient to permit warranted increases in the compensation schedule.*

"COMMENT: It must be recognized that the per pupil limitation established by the Congress determines the maximum amount which can be spent in the operations of the dependents schools. Since salaries comprise a substantial part of operating costs it is expected that in the future the per pupil limitation will have to be increased before salaries can be adjusted. The most appropriate time to start administrative action to obtain an increase in the per pupil limitation is in August of each year, the time at which final budget preparation for the following fiscal year commences. This means that determination as to warranted salary adjustments must be made in July of each year.

"NOTE: By Bureau of the Budget regulations the Department of Defense is not permitted to budget for anticipated increases in wages or salaries based on prevailing rates outside of the Federal Government. Only wage or salary schedules based on wages and salaries actually being paid can be considered.

"4. *The compensation schedule will be established and adjusted "in relation to the rates of basic compensation for similar positions in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia."*

"COMMENT 1: The above term will be applied as follows:

"(a) Comparison for the purpose of establishing and adjusting the compensation schedule will be made with rates of compensation in urban school jurisdictions of 100,000 population and over. Data from as large a proportion of these school jurisdictions as possible will be utilized.

"(b) The beginning salary step (step (a)) of the compensation schedule will be related to the average (mean) of the entrance rates paid teachers holding a bachelor's degree, by establishing step (a) at this mean amount, rounded to the nearest five dollars.

"(c) The size of the step rate increases will be related to the average (mean) of step rate increases in effect by fixing the step rate increase at the mean amount paid teachers holding a bachelor's degree, rounded to the nearest five dollars.

"COMMENT 2: If teacher salaries continue to rise, as expected, then averages taken each year as provided above will show some upward change. This will be true even if only one or a few school districts grant increases. If it is not administratively feasible to reflect very small increases, a reasonable figure, therefore, must be established as the minimum adjustment which will be made in any one year in the entrance rate and yearly increments, and only amounts which meet or exceed these minimums will be adopted. These minimum adjustment figures will be a hundred dollars at the first step and ten dollars for yearly increments.

"COMMENT 3: A point may be reached where consideration will have to be given to a limitation on adjustments where such adjustments would result in these employees paid from the compensation schedule

receiving a higher salary than their Classification Act supervisors.

"5. *When the per pupil limitation is known, final determination as to an appropriate adjustment will be made. Adjustments in the compensation schedule will be made coincident with the beginning of a school year.*

"COMMENT 1: It is planned that if the per pupil limitation is increased sufficiently to effect adjustments as provided above, such adjustments will be ordered into effect. There may be times, however, where the per pupil limitation will permit only part of the adjustment being made effective. Final determination of the adjustment, therefore, should await decision on the per pupil limitation.

"COMMENT 2: From a management standpoint, the start of the school year seems to be the most appropriate time to place adjustments in effect. In passing, however, it should be noted that when adjustments are effected, new teachers will go on duty at a salary higher than had been indicated at the time they were recruited. It is understood that this is no problem, for at the time of recruitment, prospects can be told that the starting salary will not be less than last year's figure and (if adjustments have been proposed) it may be more. Recruiters, of course, can offer a certain figure during these years when adjustments are not being proposed."

APPENDIX C

The following Table appears in H. Rep. No. 519, 89th Cong., 1st Sess. (1965), p. 11:

TABLE I.—*Trends in salary schedule averages, U.S. urban school districts, 100,000 and over in population, and overseas dependents schools, recent years*

Year	Number of districts (B.A. and M.A. classes)	B.A. salary class, mean amounts scheduled			Difference between M.A. (col. 7) and B.A. (col. 3)	M.A. salary class, mean amounts scheduled			6 years; master's plus 30 hours, mean amounts scheduled[1]		
		Beginning salary	Annual increments, number and size[2]	Maximum salary		Beginning salary	Annual increments, number and size[2]	Maximum salary	Beginning salary	Annual increments, number and size[2]	Maximum salary
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
1959-60	168	$4,070	12 at $187	$6,269	$317	$4,387	13 at $190[3]	$6,797	$4,887	13 at $213[3]	$7,661
1960-61	160	4,294	12 at $192	6,591	295	4,589	13 at $196[3]	7,135	5,064	13 at $225[3]	7,986
1961-62	167	4,454	12 at $199	6,790	313	4,767	13 at $202	7,387	5,243	13 at $229	8,221
1962-63	177	4,549	12 at $196	6,905	354	4,903	13 at $205	7,568	5,453	13 at $233	8,480
1963-64	178	4,693	12 at $201	7,101	371	5,064	13 at $213	7,829	5,661	13 at $238	8,756
1964-65	180	4,850	12 at $210	7,366	375	5,225	13 at $225	8,146	5,822	13 at $255	9,136
Department of Defense schedule:											
1960-61, 1961-62, and 1962-63	—	4,065	10 at $185	5,915	200	4,265	10 at $185	6,115	4,365	10 at $185	6,215
1963-64 and 1964-65	—	4,165	10 at $185	6,015	200	4,365	10 at $185	6,215	4,465	10 at $185	6,315

[1] Fewer schedules recognize the 6th year than recognize the B.A. and M.A.; in 1964-65 there were 119 such districts, or 66 percent of the schedules analyzed. In these 119 schedules, the figures shown in cols. 3-9 were as follows: Col. 3, $5,096; col. 4, 12 at $214; col. 5, $7,660; col. 6, $351; col. 7, $5,447; col. 8, 13 at $239; and col. 9, $8,554.

[2] Because of rounding in computations, the final increment may be slightly different from the amount shown, in order to arrive at the mean maximum.

[3] Partly estimated.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 792

JOSEPH B. CRAWFORD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are teachers presently or formerly employed in the school system maintained by the Defense Department for the education of the minor dependents of military personnel abroad. In this suit for back pay for the years 1959 through 1966, petitioners contend that the Defense Department Overseas Teachers Pay and Personnel Practices Act of 1959, 73 Stat. 213, 5 U.S.C. 2351 *et seq.* (1964 ed.),[1] imposed an in-

[1] This Act was, as discussed *infra*, substantially amended in 1966, and in its present form is codified as 20 U.S.C. 901 *et seq.* (Supp. II, 1965-66).

flexible duty on the Secretary of Defense to adjust the compensation of overseas teachers to the level of salaries paid for similar work in this country. At the relevant times the governing language of the Act authorized the Secretary of each military department, subject to regulations promulgated by the Secretary of Defense, to fix compensation for overseas teaching positions "in relation to the rates of basic compensation for similar positions in the United States," (5 U.S.C. 2353(c) (1964 ed.)). The Secretary of Defense interpreted this language as subjecting any computation of salary scale to the limitations provided by the ceiling on the funds which might be expended on education of dependents. This so-called "per pupil limitation", which was routinely inserted in Defense appropriation bills both before and after the 1959 Act, fixed the maximum average amount that could be expended for educational services in connection with each dependent.

The first year of operation under the Act (1960) presented no problem since the teachers' salaries fixed by the Secretary were generally commensurate with those paid in the United States. Thereafter, while teaching salaries in this country increased, the Department of Defense each year requested increases in the "per pupil limitation" to allow for raises for overseas teachers. Congress, however, with full knowledge of the Secretary's interpretation of the Act, declined to appropriate funds sufficient to permit the overseas teachers' salaries to keep pace.

In 1966 the Act was amended. The language authorizing the Secretary to prescribe regulations fixing

the compensation for overseas teachers "in relation to" salaries in this country was deleted. In its place Congress substituted a direction that the Secretary prescribe regulations providing for:

> (2) the fixing of basic compensation for teachers and teaching positions at rates *equal to* the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population. [20 U.S.C. 902(a)(2) (Supp. II, 1965-66) (Emphasis added).]

This amendment, however, was expressly given only prospective application by Congress (80 Stat. 118).

Relying on the 1959 Act, petitioners seek recovery of the difference between the salaries paid them and what they would have received if their salaries had been "equal to" the earnings of teachers in comparable systems in the United States. On cross-motions for summary judgment, the Court of Claims ruled in favor of the government. *Crawford, et al.* v. *United States*, 376 F. 2d 266 (Pet. App. 1a-27a). The court held that neither the language nor the legislative history of the Act supported petitioners' contentions regarding mandatory wage increases. In support of its decision, the court explained that contemporaneous construction of the Act by the Secretary, by Congress, and by petitioners' own representatives, all reflected awareness that the Act contemplated that the Secretary would have discretion in setting the rates for teachers' salaries and that future pay raises were sub-

ject to limitations in the relevant congressional appropriations.

The court also noted that this was the second suit by the overseas teachers seeking a federal court judgment raising their compensation on the basis of the Overseas Teachers Pay Act. (Pet. App. 14a). The Overseas Education Association (which represents petitioners) had previously brought a class action for mandamus against the Secretary of Defense, presenting the identical contentions made by petitioners here, *viz.*, that the Act required the Secretary to raise and to maintain overseas teachers salaries at levels equal to those prevailing in the United States. The Court of Appeals for the District of Columbia Circuit affirmed the dismissal of that action on the ground, *inter alia*, that fixing appropriate levels of teachers' pay was a matter the Act committed to executive discretion with which the court would not interfere. *Mitchell* v. *McNamara*, 352 F. 2d 700 (C.A.D.C.).

DISCUSSION

The decision of the Court of Claims is correct, in accord with the only other decision interpreting the provision in question, and of no prospective importance. Further review by this Court is therefore not warranted.

1. Petitioners rely on 5 U.S.C. 2353(c) (1964 ed.), which provided in pertinent part that:

> The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military depart-

> ment *in relation to* the rates of basic compensation for similar positions in the United States * * *. [Emphasis added.]

Essentially, petitioners contend that by this 1959 Act Congress intended to require the Secretary not only to set overseas teachers' salaries initially, but also placed on him the duty of reviewing those salaries periodically and granting wage increases automatically in order to maintain their compensation at a level "equal to" that paid in the United States, all without reference to budgetary restrictions. As the opinion of the Court of Claims makes clear, however, neither the language nor the legislative history of the statute supports that contention.

To begin with the statute was cast in discretionary, not mandatory terms. As the court noted (Pet. App. 13a), the provisions neither set specific salaries nor defined the positions which were to be looked to in the United States as "similar" to those of the overseas teachers. The Act spoke of setting pay scales "in relation to" domestic levels, and in ordinary usage this standard includes more flexibility than the "equal to" requirement petitioners would read into the statute. Nowhere was there any reference to mandatory periodic review and adjustment of those salaries once fixed initially.

The history of the legislation explains the absence of such provisions. As the court below explained (Pet. App. 5a-6a), this legislation was enacted because the conditions peculiar to school teaching (long summer vacations and holiday recess periods) could not easily be accommodated within the framework of

the pay and leave statutes covering regular government employment. It was to eliminate the hardships caused by applying those statutes to teaching positions that Congress legislated in 1959.[2] The statutes generally regulating the pay of federal civil servants contain no provision for mandatory increase in federal salaries to reflect a rise in comparable non-federal salaries. But nowhere in the committee reports or in the floor debates on the measure in suit was there the slightest suggestion that this legislation—enacted as a substitute for the regular legislation governing the conditions of federal employment—would entail such an automatic pay raise feature and confer preferred status on overseas teachers. On the contrary, as the court's opinion correctly notes (Pet. App. 14a-16a), the statute was enacted after Congress heard representatives of the overseas teachers themselves state that this legislation was not intended as a pay-raise measure.

The Court of Claims also accurately observed (Pet. App. 7a) that the Secretary's interpretation of the Act, made at the time of its passage and continuously maintained before Congress and with the teachers, was that his authority to raise the pay of overseas teachers was contingent upon adequate Congressional appropriations, *i.e.*, increases in the "per pupil limitations" on overseas school expenditures in the annual Defense Department appropriation bills. As the court's opinion notes (Pet. App. 2a-5a), there is no

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[2] See H. Rep. No. 357, 86th Cong., 1st Sess.; S. Rep. No. 141, 86th Cong., 1st Sess.

permanent legislation respecting the overseas school program for military dependents. Authority to operate such schools is found only in the annual Defense Department appropriation acts (see Pet. App. 3a). These appropriations consistently limited the funds expendable for such purposes to an average specified amount "per student", and such expenditures historically determined the amounts available for the salaries of overseas teachers. In this context, the Secretary's interpretation of the Act as authorizing him to raise teachers' salaries only if Congress raised the "per pupil" allotment sufficiently to permit him to do so, was an entirely reasonable conclusion. In some years Congress accepted the Secretary's request that the "per pupil limitation" be raised so that teachers' salaries could be increased, and in other years Congress refused (Pet. App. 9a). The Court of Claims did not err in accepting the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion". *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315. Accord, *Udall* v. *Tallman*, 380 U.S. 1, 16; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. This deference is particularly appropriate in this case; not only was the administrative interpretation repeatedly brought to the attention of Congress,[3] but petitioners' own representatives also advised the legislature of their similar understanding and the Congress in each appropriation bill acted on

[3] See the lengthy catalogue establishing this fact in note 8 to the opinion below, Pet. App. 18a.

the basis of that understanding. See Pet. App. 16a-17a. *Power Reactor Co.* v. *Electricians, supra,* 367 U.S. at 408-410; *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 318-319.[4]

2. The ruling below does not conflict with any other decision. On the contrary, it is in accord with the refusal by the District of Columbia Circuit to grant relief on the basis of the same contentions that are urged here. See *Mitchell* v. *McNamara,* 352 F. 2d 700 (C.A.D.C.).

Petitioners' reliance on the decisions of this Court in *United States* v. *Langston,* 118 U.S. 389 (1886), and *United States* v. *Vulte,* 233 U.S. 509 (1914), is wide of the mark. Those cases hold only that statutes fixing the salaries of public officers at a "designated sum" are not considered to be abrogated by subsequent acts which appropriate lesser amounts for that officer for given years, absent specific language to that effect.[5] Here, as the court below noted (Pet. App. 13a), the Act did not establish specific levels for the salaries of overseas teachers, and under the Sec-

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[4] Congressional acquiesence in the Secretary's interpretation of the Act in suit is pointed up by the Senate's refusal to permit the Defense Department to pay for certain items traditionally included in the per pupil allotment out of other funds in order to increase the money available for teachers' salaries. See S. Rep. No. 1238, 88th Cong., 2d Sess., pp. 17-18 (July 24, 1964).

[5] Of course, as the Court has recognized, Congress may certainly repeal substantive legislation in later appropriations measures. *E.g., United States* v. *Dickerson,* 310 U.S. 554; *Belknap* v. *United States,* 150 U.S. 588; *United States* v. *Mitchell,* 109 U.S. 146.

retary's regulations (see Pet. App. 32a-34a) the salaries would not be set administratively until Congress determined the "per pupil limitation." By its regular refusal to approve Defense Department budgets sufficient to provide for the pay increases petitioners believed to be mandatory, Congress was not repealing earlier substantive legislation. It was simply legislating in accordance with its own and the Secretary's understanding that the Act made such raises contingent on Congressional approval of expenditures for that purpose. Cf. *Panama Canal Co.* v. *Grace Line*, *supra*.

3. Finally, the question of statutory construction posed by petitioners is not a matter of prospective importance. As we noted above (pp. 2-3), on April 14, 1966, the Overseas Teachers Pay Act was amended to direct the service Secretaries to fix basic compensation for overseas teachers "at rates *equal to*" average rates for similar employment in specified urban school districts in this country. 20 U.S.C. 903 (c) (Emphasis added). This change, however, was expressly made prospective only. See 80 Stat. 118.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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